

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

STEPHEN T. VOGRIN,

Plaintiff,

v.

Civil Action No. 5:98CV117
(STAMP)

BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS, UNITED STATES
OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANT DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS'S
MOTION TO DISMISS,
GRANTING PLAINTIFF STEPHEN T. VOGRIN'S
MOTION TO SUPPLEMENT THE RECORD
AND VACATING TRIAL PROCEEDINGS

Pending before this Court is a motion to dismiss or, in the alternative, a motion for summary judgment ("motion to dismiss") filed by defendant Department of Treasury, Bureau of Alcohol, Tobacco and Firearms ("BATF") pursuant to Rules 12(b)(1), 12(b)(6) and 56 of the Federal Rules of Civil Procedure by which defendant BATF seeks dismissal of all claims filed by the plaintiff Stephen T. Vogrin ("Vogrin") in his amended complaint for lack of subject matter jurisdiction. Defendant BATF filed a memorandum of law in support of its motion to dismiss. Plaintiff Vogrin has filed his response to defendant's motion to dismiss and defendant has filed its reply to the plaintiff's response to the motion to dismiss.

This Court has reviewed the applicable law and memoranda in support of and in opposition to the pending motion and finds

that defendant's motion to dismiss should be granted pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and that the non-jury trial proceedings conducted in this case should, therefore, be vacated.¹

I. Procedural History

On December 16, 1998, plaintiff Vogrin filed an Amended Complaint alleging that defendant BATF violated provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. §§ 552(a)(g)(1)(A), (B), (C), and (D). Although the United States of America is named in the caption, the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms is the only proper party defendant in this civil action. See 5 U.S.C. § § 552 and 552(a). With respect to the Freedom of Information Act ("FOIA") claim, plaintiff Vogrin alleged that defendant BATF failed to respond to his FOIA request in a timely manner. As to the Privacy Act claims, plaintiff Vogrin had initially identified six documents prepared between December 15, 1993 and March 28, 1995, which documents allegedly constituted a violation of the Privacy Act. As to these documents, plaintiff Vogrin alleged that defendant BATF failed to maintain

¹ Following the non-jury trial in this civil action, plaintiff Vogrin filed a motion to supplement the record, and memorandum in support thereof, to add plaintiff's Exhibit 43, a subpoena dated April 22, 1996 issued to Mark Swartswelder by the United States Department of Labor, Office of Workers' Compensation Programs, to which defendant BATF has filed no response. Although the trial proceedings are vacated by this order, this Court, for purposes of making a complete record, GRANTS plaintiff's motion to supplement the record.

these records in an accurate manner, improperly disclosed the records which BATF knew were inaccurate, refused to allow plaintiff Vogrin access to these records, and refused to amend the records.

Defendant BATF then filed a motion to dismiss or, in the alternative, a motion for summary judgment (which is a different motion than the motion before this Court at this time). In that motion, defendant BATF claimed that plaintiff Vogrin's amended complaint should be dismissed because his claims were moot, time barred, failed to state a cause of action upon which relief could be granted, were precluded by the Civil Service Reform Act or were filed prior to the exhaustion of his administrative remedies.

With respect to that earlier motion to dismiss, this Court, by a letter dated February 15, 2000, dismissed plaintiff's FOIA claim because of his failure to exhaust administrative remedies and because his claims were moot. This Court also dismissed plaintiff's Privacy Act claims filed under 5 U.S.C. §§ 552(a)(g)(1)(A) and (B) because of plaintiff Vogrin's failure to exhaust his administrative remedies. Further, this Court dismissed plaintiff Vogrin's claims filed under 5 U.S.C. §§ 552(a)(g)(1)(C) and (D) as to those records specifically identified in the Amended Complaint because those claims were time barred.

However, this Court did not, at that time, dismiss plaintiff Vogrin's Privacy Act claims made pursuant to 5 U.S.C. §§ 552(a)(g)(1)(C) and (D) as to certain documents that plaintiff alleged he did not know about or have reason to know about prior to two years before this civil action was filed. Therefore, plaintiff was permitted to pursue his Privacy Act claims under §§ 552(a)(g)(1)(C) and (D) as to those "private files" and diary notes that were maintained by plaintiff Vogrin's supervisor at BATF. Plaintiff seeks damages for alleged violations of the FOIA and Privacy Act, contending that the above-mentioned records are inaccurate, incomplete, untimely, or irrelevant and that these records affected him psychologically causing him stress, anxiety, and depression. Plaintiff claims that because of these psychological injuries, he has been and will continue to be unable to work.

After this Court issued its rulings on February 15, 2000 regarding the dispositive motions pending before it at that time, the Court then proceeded to conduct the scheduled non-jury trial as to the remaining claims. On February 22, 2000, the day before the trial, defendant BATF, during a telephone conference with this Court and plaintiff Vogrin, raised for the first time the contention that this Court lacked subject matter jurisdiction to hear plaintiff Vogrin's claims because these claims were precluded by the Federal Employee's Compensation Act ("FECA"), 5 U.S.C. § 8101, et seq. This Court proceeded to

conduct the trial subject to giving defendant BATF the right to submit a motion on the lack of subject matter jurisdiction issue subsequent to the trial.

II. Facts

Plaintiff Vogrin was employed as an agent for defendant BATF beginning in July 1978. From July 1978 to May 1993, Vogrin was assigned to the Wheeling field office of BATF. Following an Internal Affairs investigation in 1992, Vogrin was placed on restricted duty. Vogrin's employment was subsequently terminated by BATF in May 1993 because of his involvement in certain unreported outside employment activity and other violations. Vogrin then appealed his termination to the Merit Systems Protection Board which reduced his termination to a sixty-day suspension and awarded him back pay and other benefits. Vogrin then returned to work at the BATF office in Wheeling in October 1993.

Plaintiff Vogrin claims that upon returning to the BATF office in Wheeling, he began to experience harassment and disparate treatment by his BATF supervisor. Vogrin claims that as a result of this treatment, he became unable to work because of stress, anxiety, and depression. Vogrin then filed a claim for FECA benefits. In that claim, he maintained that because he had received inaccurate records and was subject to multiple acts of harassment by his BATF supervisor, he sustained "work-related stress anxiety and severe depression." See Def.'s Mot. to

Dismiss, Ex. B, "Notice of Occupational Disease and Claim for Compensation."

Plaintiff Vogrin attached to his FECA claim the March 6, 1995 report of Dr. Charles William Hewitt, a Wheeling, West Virginia psychologist. In that report, Dr. Hewitt indicated that plaintiff Vogrin was suffering from Major Depression, Dysthymia, and Generalized Anxiety Disorder. See Def.'s Mot. to Dismiss, Ex. B, "Psychological Report" at 13. It is Dr. Hewitt's opinion that the above-stated conditions were due to Vogrin's work conditions at the Wheeling field office of BATF. Plaintiff Vogrin also attached to his FECA claim a statement in support of that claim. See Def.'s Mot. to Dismiss, Ex. B, "Answers to Questions 1 and 2." In his statement, plaintiff Vogrin identified the events that he attributed as the cause of his psychological problems. These events included certain mid-year evaluations that he received in December 1993, January 1994, March 1994, August 1994, and December 1994. He also described an October 1993 meeting in Philadelphia with his supervisor Robert Graham involving the possibility of an unauthorized wiretap. In his statement, plaintiff Vogrin claimed that his "stress mounted and became compounded by the multiple acts of harassment until culminating in my inability to physically and mentally work with the ATF who has caused all of these conditions." See id. at 18.

In September 1995, plaintiff Vogrin's FECA claim was denied on the grounds that the evidence failed to show that the claimed condition occurred in the course of his duty. See Def.'s Mot. to Dismiss, Ex. C. Plaintiff Vogrin then requested a hearing on that decision which was held in April 1996. Again, plaintiff Vogrin's FECA claim was denied. See Def.'s Mot. to Dismiss, Ex. D. Plaintiff Vogrin then appealed the decision of the hearing representative and in March 1998, plaintiff Vogrin's FECA claim was granted and he was awarded FECA benefits as to his psychological injury. See Def.'s Motion to Dismiss, Ex. E.

After he received his FECA benefits award, plaintiff Vogrin filed his Amended Complaint in this Court. In that Amended Complaint, plaintiff Vogrin identified documents provided to him by his BATF supervisor between December 1993 and March 1995. These documents were the same documents plaintiff Vogrin cited as the cause of his psychological injuries in connection with his FECA claim. Plaintiff Vogrin alleged that each of these documents were inaccurate, incomplete, untimely, and/or irrelevant and that these documents affected his psychological condition causing him stress and depression. Plaintiff Vogrin also maintained that, in addition to these documents, certain "private files" and diary notes received through discovery in this civil action and which were maintained by his BATF supervisor were also the cause of his psychological injuries. Plaintiff Vogrin seeks damages under the Privacy Act for these

injuries. In support of his FOIA and Privacy Act claims in this civil action, plaintiff Vogrin provided BATF with two reports from Dr. Hewitt. The first report was the same report submitted by plaintiff Vogrin as part of his FECA claim. The second report, dated March 2, 1999, was a report in which Dr. Hewitt restated his opinion expressed in his earlier report. See Def.'s Motion to Dismiss, Ex. F.

Plaintiff Vogrin also provided defendant BATF with the report of Robert M. Wettstein, M.D., a psychiatrist, dated February 18, 1998. See Def.'s Mot. to Dismiss, Ex. G. Dr. Wettstein had performed a psychiatric examination and evaluation of plaintiff Vogrin with respect to his FECA claim. Dr. Wettstein's opinion was that Vogrin's "psychiatric disorders" were related to his work at BATF.

Finally, plaintiff Vogrin provided the defendant BATF with a more recent report from Dr. Hewitt dated February 22, 2000. See Def.'s Mot. to Dismiss, Ex. H. Dr. Hewitt notes in that report that he has now been made aware of the "private files" and diary notes of Vogrin's supervisor at BATF. Dr. Hewitt's most recent diagnosis is that plaintiff Vogrin "continues to suffer from Major Depression, Recurrent; Dysthymia; Generalized Anxiety; with Residuals of Post-Traumatic Stress Disorder-like Symptoms and Paranoid-like Symptoms." Dr. Hewitt's most recent prognosis is that "Mr. Vogrin has a fair prognosis provided he can sever ties and contacts with ATF and the Department of

Labor." Regarding employability, Dr. Hewitt's opinion is that "Mr. Vogrin is currently not employable in any recognized segment of the job market. He will be employable after substantial remission of current and heretofore chronic symptomatology." Dr. Hewitt states, regarding causation, that "Mr. Vogrin's psychological/psychiatric conditions, including Depression, Anxiety, Symptoms of Post-Traumatic Stress Disorder, and Paranoid Symptoms were caused by his negative experiences while employed by ATF and subsequent experiences and revelations regarding his employment."

The above facts as presented by defendant BATF in its second motion to dismiss, now pending before this Court, are not disputed by the plaintiff Vogrin in his response to this motion.

III. Standards

The burden of proving subject matter jurisdiction on a motion to dismiss is on the plaintiff, the party asserting jurisdiction. A trial court may consider evidence by affidavit, deposition, or live testimony without converting the proceeding to one for summary judgment. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982); Mims v. Kemp, 516 F.2d 21 (4th Cir. 1975). A lack of subject matter jurisdiction may be asserted at any time by any interested party either in the form of the answer or in the form of a suggestion to the court prior to final judgment. 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and

Procedure § 1350, at 201-02 (2d ed. 1990). Where a defendant moves for dismissal for lack of subject matter jurisdiction, as well as on other grounds, "the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." Rhulen Agency, Inc. v. Alabama Ins. Guaranty Assoc., 896 F.2d 674, 678 (2d Cir. 1990) (quoting 5 C. Wright and A. Miller, Federal Practice and Procedure § 1350, p. 548 (1969)). Because the court's very power to hear the case is at issue in a Rule 12(b)(1) motion, the trial court is free to weigh the evidence to determine the existence of its jurisdiction. No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. See Materson v. Stokes, 166 F.R.D. 368, 371 (E.D. Va. 1996). Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. See Fed. R. Civ. P. 12(h)(3).

IV. Contentions of the Parties

At bottom, the issue before this Court at this time is whether the FECA, 5 U.S.C. § 101, et seq., provides the exclusive remedy for a federal employee's injuries sustained in the performance of that employee's duties. The defendant BATF

contends that FECA provides the exclusive remedy and that, consequently, having recovered under FECA plaintiff Vogrin cannot thereafter sue and recover under other federal statutes, specifically the FOIA and the Privacy Act. On the other hand, the plaintiff Vogrin maintains that FECA is not the exclusive remedy and that even having recovered benefits under FECA, he is still free to pursue remedies under other federal statutes, including the FOIA and the Privacy Act. Specifically, this Court is called upon to determine the applicability of 5 U.S.C. § 8116(c) of the FECA and whether that provision makes recovery under FECA the exclusive remedy for a plaintiff, thus barring recovery under other federal statutes.

Title 5, United States Code, Section 8116(c) provides as follows:

The liability of the United States or an instrumentality thereof under this subchapter [5 U.S.C. §§ 8101 et seq.] or an extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

Defendant BATF points out that FECA vests with the Secretary of Labor the power to "administer and decide all questions arising under [FECA]." 5 U.S.C. § 8145. Defendant BATF notes

that the Secretary's action in allowing or denying an award under FECA is final and not subject to judicial review. See Heilman v. United States, 731 F.2d 1104, 1109 (3d Cir. 1984). Defendant BATF argues that a federal employee's injuries that are compensable under FECA cannot be compensated under other federal remedial statutes such as the Privacy Act or the Federal Tort Claims Act. See Lyon v. United States, 94 F.R.D. 69, 72 (W.D. Okla. 1982). Defendant BATF argues that the procedure outlined in FECA provides the exclusive method of presenting a compensable claim resulting from employment related injuries of federal employees. The defendant asserts that plaintiff Vogrin's injuries were covered by FECA and he received an award for the same psychological or psychiatric disability that he now claims in his FOIA and Privacy Act civil action. Defendant BATF points out that Vogrin has received FECA benefits in the past and will continue to receive FECA benefits for the psychological injuries which are the same injuries raised in the statutory claims in this civil action. Defendant BATF points out that the exhibits attached to its motion to dismiss clearly reflect that the medical examiners offering opinions as to plaintiff Vogrin's psychological injuries all conclude that his injuries were caused by his work experiences while he was employed by defendant BATF. Defendant argues that even if plaintiff had not sought FECA benefits, all the medical evidence establishes that Vogrin's psychological injuries were caused by his employment

relationship and are, therefore, subject solely to the remedial provisions of FECA. Accordingly, defendant BATF states that Vogrin's exclusive remedy for his alleged psychological injuries is through FECA and the authority of the Secretary of Labor. Plaintiff Vogrin, on the other hand, cites the remedial provisions under the Privacy Act, 5 U.S.C. § 552(a)(g)(1) as follows:

Civil remedies. -- Whenever any agency

. . . .

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district court of the United States shall have jurisdiction in matters under the provisions of this subsection.

Plaintiff Vogrin, therefore, argues that Congress intended to encourage the widest possible citizens' enforcement through the judicial process of violations of the Privacy Act. See Parks v. United States Internal Revenue Service, 618 F.2d 677 (10th Cir. 1980). Plaintiff Vogrin maintains that defendant is merely trying to circumvent his right to bring an action under the Privacy Act and to recover damages provided under that statute

by claiming that he has already received FECA benefits. Plaintiff Vogrin asserts that under case law the injury for which compensation is sought must fall within the coverage of the FECA. Plaintiff Vogrin notes that the cases cited by defendant BATF only involve the Federal Tort Claims Act not the Privacy Act. Plaintiff Vogrin argues that the remedies provided under the Privacy Act are separate and distinct from compensation received under FECA and that the evidence that has been presented in this case proves that defendant BATF violated the clear statutory language of the Privacy Act. Finally, plaintiff believes that defendant has focused its argument solely upon the psychological injuries sustained by plaintiff Vogrin. Plaintiff points out that assuming he can establish an intentional or willful violation of the Privacy Act, he would be entitled to recover damages which are much broader than the psychological injuries sought under his Privacy Act claim and under his FECA claim. Those damages, plaintiff argues, would include damages for loss of earning capacity, loss of employment, injury to reputation, loss of pension rights, as well as damages for intentional infliction of emotional distress. Also, plaintiff Vogrin contends that the Privacy Act violations that remain in this case relate to documents which were not disclosed to plaintiff Vogrin until September 1996, more than three years after the FECA hearing and when plaintiff Vogrin was no longer an employee of defendant BATF.

In response to plaintiff's contentions, defendant BATF contends that plaintiff's attempt to receive additional compensation through a Privacy Act suit for psychological injuries for which he has already been compensated for under FECA, is only a "back door effort" by plaintiff Vogrin to circumvent the authority of the Secretary of Labor. See Lyon, 94 F.R.D. at 72. ("A Privacy Act claim is not a back door mechanism to subvert the authority bestowed upon the Secretary of Labor to handle employee compensation claims. It has long been settled that a procedure outlined in the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101, et seq., provides the exclusive method of presenting compensation claims resulting from on the job injuries of federal employees"). Further, defendant BATF contends that plaintiff's Amended Complaint in this civil action is nothing more than an assertion of a common federal tort claim. Defendant BATF points out that prior to filing this civil action, plaintiff filed an earlier lawsuit in this Court in which he and his wife asserted common law tort claims against plaintiff's supervisor, Marc Swartswelder. In that civil action, Vogrin, et al. v. United States of America, Civil Action No. 5:97CV43, plaintiff Vogrin alleged that Swartswelder made personnel decisions adversely affecting his employment with the federal government and that these actions were intentional and caused him severe emotional distress. After substituting the United States for Swartswelder as a

defendant, this Court dismissed plaintiff's Federal Tort Claims Act lawsuit due to a failure to exhaust administrative remedies. Therefore, defendant BATF asserts that plaintiff Vogrin in this case is merely restating his earlier tort action as a Privacy Act claim.

V. Discussion

The exclusivity provision contained in 5 U.S.C. § 8116(c) is clear and unambiguous. It specifically provides that the liability of the United States or an instrumentality thereof under FECA with respect to the injury of an employee is exclusive and is instead of all other liability of the United States or the instrumentality thereof to the employee because of the injury to that employee in a direct judicial proceeding, in a civil action, or by an administrative or judicial proceeding under a federal tort liability statute.

Congress's purpose in enacting 5 U.S.C. § 8116(c) was explained in Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-94 (1983), as follows:

[FECA] was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign immunity. In enacting this provision, Congress adopted the principal compromise -- the "quid pro quo" -- commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government.

There are several cases which apply this exclusivity provision to suits brought later under the Federal Tort Claims Act. While

there do not appear to be any reported decisions directly applying the exclusivity provision under the FECA to a proceeding brought under the Privacy Act or FOIA, this Court finds that the exclusivity provision under 5 U.S.C. § 8116(c) clearly provides that FECA is the exclusive remedy in this case. Consequently, any suit including but not limited to those brought under the Federal Tort Claims Act would be barred and the Court in the subsequent proceeding would lack subject matter jurisdiction. The rationale is a clear one as explained in Lockheed. Congress adopted the compromise found in workers' compensation legislation to guarantee that federal employees could receive compensation for work-related injuries while, in return, losing their rights to sue the United States Government or its instrumentalities.

It appears clear to this Court that plaintiff Vogrin's injuries were covered by FECA and that he submitted and was awarded benefits for psychological and psychiatric disabilities. The medical matters raised in the FECA claim are the same matters raised in his Privacy Act civil action. These injuries were work-related to his employment with defendant BATF. The exclusivity provision contained in 5 U.S.C. § 8116(c) precludes a suit under the Privacy Act even if FECA does not provide benefits for all of the injuries that plaintiff Vogrin claims. In Woodruff v. United States of America, 954 F.2d 634, 636 (11th Cir. 1992), the court stated:

Enacted in 1916, FECA provides workers' compensation coverage for federal civilian employees who are injured while in the performance of their duties. 5 U.S.C. § 8102(a). It is the exclusive remedy against the United States for any federal employee whose injuries or death fall within the scope of the statute, and precludes recovery in another direct judicial proceeding or under a federal tort liability statute. 5 U.S.C. § 8116(c). . . .

In Ezekiel v. Michel, 66 F.3d 894 (7th Cir. 1995), a nurse employed at a Veterans Administration hospital brought a tort action against a resident physician at the hospital alleging that she was accidentally pricked by a contaminated hypodermic needle which the physician had allegedly failed to properly cap or dispose of. The district court found that the physician was a federal employee acting within the scope of his employment at the time of the alleged negligent act. The court then substituted the United States as the proper defendant under the Federal Tort Claims Act and the claim was dismissed for lack of subject matter jurisdiction with the court ruling that the plaintiff could not maintain suit against the United States under the Federal Tort Claims Act because she was a federal employee injured on the job and that, therefore, her exclusive remedy was the FECA, citing the exclusivity provision under 5 U.S.C. § 8116(c). Id. at 898.

While the Federal Tort Claims Act and the Privacy Act are obviously not identical in their provisions, there are certain similarities to their remedies, particularly the remedies sought by plaintiff Vogrin in this action. Indeed, it appears to this

Court that plaintiff Vogrin has attempted to use the Privacy Act as a tort liability statute. The FECA is intended to serve as a substitute rather than a supplement for a tort action. See White v. United States, 143 F.3d 232, 234 (5th Cir. 1998). In Griffin v. United States, 703 F.2d 321 (8th Cir. 1983), a United States Postal Service employee who allegedly sustained back injury while employed by the Service sued the United States under the Federal Tort Claims Act. The district court dismissed the suit on the grounds that the employee's sole remedy was the FECA. On appeal, the decision was affirmed. The court in Griffin stated:

The FECA only applies to a federal employee injured on the job. If the injury occurs when the employee is not on the job, then the FECA is not the exclusive remedy -- or even the appropriate remedy. But if the personal injury did occur on the job -- as concededly Griffin's did -- then FECA is the exclusive remedy. That the FECA does not compensate an employee with Griffin's particular injury is a question of scope of coverage, not coverage in and of itself.

Id. at 322 (citations omitted).

This Court finds that, based upon the facts in this case, the fact that plaintiff Vogrin has sought and received benefits under the FECA precludes his filing suit and pursuing a cause of action under the FOIA and the Privacy Act, because of the exclusivity provision contained in the FECA, 5 U.S.C. § 8116(c). Accordingly, this Court is required to dismiss this civil action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. For the reasons stated above, this Court need not

address or decide this matter under Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 56.

VI. Conclusion

Accordingly, defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(1) is hereby GRANTED, plaintiff's motion to supplement the record is hereby GRANTED, and the non-jury trial proceedings conducted herein prior to receiving defendant's motion to dismiss for lack of subject matter jurisdiction are VACATED. It is further ORDERED that this case is hereby DISMISSED and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: March 30, 2001

_____/s/
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE